Nasharuddin bin Nasir v Kerajaan Malaysia & Ors

HIGH COURT (SHAH ALAM) — PERMOHONAN JENAYAH NO 44-11-2002
SURIYADI J
18 JUNE 2002

Administrative Law *— Rules of natural justice — Right to be represented — Whether denial of access was justified by the police by reasons of early stages of investigation and as to avoid any derailment to a smooth investigation — Inability to discharge duties by solicitors — Federal Constitution arts 5(3), 151(3), Internal Security Act 1960 ss 8, 16*

The detainee was arrested on 17 April 2002 with access to his solicitors being denied by the police. The denial of access was justified by the police by reasons of that the investigation of the detainee was at the early stages and to avoid any derailment to a smooth investigation in matters of internal security. With that refusal, the solicitors alleged that their work was impeded due to their inability to obtain precise instructions and hence unable to discharge their duty to the detainee. The solicitors had prayed for the right to access to see the detainee under the first prayer and also an order of habeas corpus. Due to the consequential effect of the first prayer, the applicant had applied that the first prayer be dealt with first before proceeding with other prayers.

Held, allowing the application:

(1) Under art 5(3) of the Federal Constitution a detainee having being arrested is entitled to legal representation. The next question that follows would be where or at what stage may his lawyers meet with him in order to put into effect that constitutional right. The right of legal representation would be meaningless if a detainee were to be denied of professional assistance caused by some overzealous but ill-informed administrator. Having scrutinized art 5(3), the court failed to identify anywhere in the article expressed or inferred which authorizes the police to deny that access. The honourable court found that in the event an access was rejected, to expect the police to adduce cogent evidence would mean that the burden of proof would have shifted to them to support the objection. Therefore, there is no necessity for the authorities to justify the rejection of the access application. The onus still remains on the detainee to prove mala fide on the part of the police (see pp 69E–G, 70B, 71E–F); *Ooi Ah Phua v Officer In Charge of Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198 and *Theresa Lim Chin Chin v Inspector General of Police* [1998] 1 MLJ 293 followed; *Saul Hamid v PP* [1987] 2 MLJ 76 not followed and *Karam Singh v Minister of Home Affairs* [1969] 2 MLJ 129 distinguished.

(2) It is the view of the court that art 151(3) of the Federal Constitution and s 16 of the Internal Security Act 1960 are provisions that bestow a privilege on the authority whether to release or not the information subject to it not being against

national interest. The issue of disclosure of information vis-a-vis the constitutional right of a detainee to have access to counsel is two totally separate and distance matters. Article 5(3) distinctly deals with the constitutional right of a detainee to consult a lawyer while art 151(3) and s 16 of the Internal Security Act 1960 deal with the right of authorities to disclose information which will not be against national interest (see p 70G–H); *Mohd Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 2 MLJ 481 not followed; *Theresa Lim Chin Chin v Inspector General of Police* [1998] 1 MLJ 293 followed.

(3) The court found after sifting through the evidence that the calculative selection and motive of the police was questionable. The police had deprived him of prompt professional advice at such a crucial moment bearing in mind that the incarceration of a person not in accordance with the law however short must not be condoned. Furthermore, the honourable court failed to find any presumption or conclusion that lawyers have a higher propensity to be meddlesome and a greater threat to the security of the country at that stage of the police investigation (see p 72A–B).

[Bahasa Malaysia summary

Orang tahanan tersebut telah ditangkap pada 17 April 2002 di mana akses kepada peguambela beliau dinafikan oleh pihak polis. Penafian akses telah dijustifikasikan oleh pihak polis dengan sebab-sebab bahawa siasatan terhadap orang tahanan tersebut masih di peringkat awal dan untuk mengelakkan daripada apa-apa penyimpangan satu siasatan yang lancar berhubung perkara-perkara keselamatan dalam negeri. Dengan keengganan tersebut, peguambela tersebut mengatakan bahawa kerja mereka telah terhalang akibat daripada ketidakupayaan mereka untuk memperoleh arahan-arahan terperinci dan justeru itu tidak berupaya untuk melaksanakan kewajipan mereka terhadap orang tahanan tersebut. Peguambela telah memohon hak akses untuk berjumpa orang tahanan tersebut dalam permohonan pertama dan juga satu perintah habeas corpus. Akibat daripada kesan penting permohonan pertama tersebut, pemohon telah pemohon agar permohonan pertama tersebut diuruskan terlebih dahulu sebelum meneruskan dengan permohonan-permohonan lain.

Diputuskan, membenarkan permohonan tersebut:

(1) Di bawah perkara 5(3) Perlembagaan Persekutuan, seorang tahanan yang telah ditangkap berhak mendapat wakil di sisi undang-undang. Persoalan kedua adalah di mana atau di peringkat apa peguam beliau boleh berjumpa dengan beliau bagi tujuan melaksanakan hak perlembagaan tersebut. Hak mendapat wakil di sisi undang-undang tidak akan bererti jika seorang tahanan dinafikan bantuan profesional yang akibat daripada

pentadbir yang terlalu bersemangat tetapi tidak dimaklumkan secukupnya. Setelah meneliti perkara 5(3), mahkamah gagal untuk mengenalpasti di mana-mana dalam perkara tersebut secara nyata atau inferens yang memberi kuasa kepada pihak polis untuk menafikan akses tersebut. Mahkamah yang mulia mendapati bahawa dalam keadaan satu akses ditolak, untuk mengharapkan pihak polis mengemukakan keterangan yang meyakinkan akan bermakna bahawa beban bukti akan berpindah kepada mereka untuk menyokong bantahan tersebut. Oleh itu, tiada keperluan untuk pihak berkuasa menjustifikasikan penolakan permohonan akses tersebut. Beban masih kekal pada orang tahanan tersebut untuk membuktikan mala fide di pihak polis (lihat ms 69E–G, 70B, 71E–F); *Ooi Ah Phua v Officer In Charge of Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198 dan *Theresa Lim Chin Chin v Inspector General of Police* [1998] 1 MLJ 293 diikut; *Saul Hamid v PP* [1987] 2 MLJ 76 tidak diikut dan *Karam Singh v Minister of Home Affairs* [1969] 2 MLJ 129 dibeza.

(2) Ia adalah pandangan mahkamah bahawa perkara 151(3) Perlembagaan Persekutuan dan s 16 Akta Keselamatan Dalam Negeri 1960 adalah peruntukan-peruntukan yang mengurniakan satu hak keistimewaan ke atas pihak berkuasa sama ada untuk mendedahkan atau tidak maklumat tersebut tertakluk kepadanya tidak bercanggah dengan kepentingan negara. Persoalan pendedahan maklumat melalui hak perlembagaan seorang tahanan untuk mendapat akses kepada peguam adalah dua persoalan yang berasingan dan perkara yang tidak sama. Perkara 5(3) secara terperinci berbincang tentang hak-hak perlembagaan seorang tahanan untuk mendapat nasihat peguam sementara perkara 151(3) dan s 16 Akta Keselematan Dalam Negeri 1960 berbincang tentang hak pihak berkuasa untuk mendedahkan maklumat yang tidak akan bercanggah dengan kepentingan negara (lihat ms 70G–H); *Mohd Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 2 MLJ 481 tidak diikut; *Theresa Lim Chin Chin v Inspector General of Police* [1998] 1 MLJ 293 diikut.

(3) Mahkamah mendapati selepas meneliti keterangan bahawa pilihan dan motif kalkulatif pihak polis boleh dipersoalkan. Pihak polis telah mengilankan beliau daripada mendapat nasihat profesional dengan segera pada saat yang genting dengan mengambilkira bahawa penahanan seseorang yang tidak menurut undang-undang walau bagaimana singkatpun tidak boleh diterima. Tambahan pula, mahkamah yang mulia telah gagal untuk menemui apa-apa andaian atau kesimpulan yang peguam-peguam mempunyai kecenderungan yang lebih suka menyibuk dan adalah ugutan kepada keselamatan negara di peringkat siasatan polis tersebut (lihat ms 72A–B).]

Notes

For cases on right to be represented, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 618.

Cases referred to

Ooi Ah Phua v Officer in Charge Criminal Investigation Kedah/Perlis [1975] 2 MLJ 198 (folld)

Saul Hamid v PP [1987] 2 MLJ 736 (not folld)

Theresa Lim Chin Chin v Inspector General of Police [1998] 1 MLJ 293 (folld)

Mohamad Ezam Mohd Nor & Ors v Inspector General of Police [2001] 2 MLJ 481 (not folld)

Karam Singh v Minister of Home Affairs [1962] 2 MLJ 129 (distd)

Legislation referred to

Federal Constitution arts 5(3), 151(3)

Internal Security Act ss 8, 16

Suriyadi J: The factual matrix of the case revealed that the detainee was arrested on 17 April 2002, with access to his solicitors having been denied by the police, as reflected in its reply letter. The refusal letter dated 10 May 2002 was in reply to his solicitors' letter of 3 May 2002.

Found in encl 8 it reads as follows:

SAIFUL KASRI & ASSOCIATES,
Advocates & Solicitors,
Peguambela & Peguamcara,
Suite 6.08B,
6 Floor, Wisma Central,
50450 Jalan Ampang,
KUALA LUMPUR.

Tetuan,
Penahanan Nasharuddin bin Nasir di bawah Akta Keselamatan Dalam Negeri (AKDN) 1960

Dengan hormatnya surat tuan dalam bilangan SKA/SMN/LIT 124/02 (SIR) bertarikh 3 Mei 2002 adalah berkaitan.

Saya telah mempertimbangkan permohonan tuan untuk melawat anakguam tuan. Memandangkan siasatan ke atas anakguam tuan masih di peringkat awal dan melibatkan perkara-perkara keselamatan Malaysia serta bagi mengelakkan sebarang gangguan yang mungkin boleh menjejaskan kelancaran siasatan tersebut dukacita dimaklumkan kebenaran lawatan tidak dapat diberi pada waktu ini.

Sekian, terima kasih
'BERKHIDMAT UNTUK NEGARA'
Saya yang menurut perintah,
t.t

(DATO' HJ MD LAZIM BIN HJ AHMAD)
bp Pengarah Cawangan Khas
bp Ketua Polis Negara

(In a gist and loosely interpreted, the above second paragraph would read as follows:

> I have considered your application to visit your client. Bearing in mind that the investigation of your client is still at the early stages, which pertained matters of Malaysian security, and to avoid any disaffections that could derail a smooth investigation, it is with regret that permission cannot be granted at this stage.)

With that refusal, the solicitors for the detainee alleged that their work was impeded due to their inability to obtain precise instructions, and hence unable to discharge their duties. What ensued was the *notis usul* (encl 1), which not only prayed for the right of access by solicitors to see the detainee under the first prayer, but also the substantial order of *habeas corpus*. Due to the consequential effect of the first prayer, the applicant at the outset had applied that it be dealt with first, before proceeding with the other prayers, a request that I thought was quite reasonable in the circumstances of the case. On that understanding, unless otherwise stated, I would be focusing my discussion only on this access aspect in this judgment.

In a gist this first prayer entailed the taking of instructions by the detainee's solicitors, for the purpose of smooth passage when discharging their duties during the stage of the investigation, ie prior to the issuance of any detention order under s 8 of the Internal Security Act 1960. The basis of this application of access adverted to by the detainee was art 5(3) of the Federal Constitution.

The first question posed by me that needed immediate attention by the respondent, was whether the police, after having arrested the detainee could legally prevent the detainee's solicitors from seeing him. Under art 5(3) of the Federal Constitution, it is quite clear that a detainee after having been arrested is entitled to legal representation. The consequential question that flowed will be when or at what stage may his lawyers meet up with him, to put into effect that constitutional right.

It is indisputable that, the right of legal representation would be meaningless if a detainee were to be denied of access to professional assistance, due to some overzealous but ill-informed administrator. Having scrutinized the above art 5(3) I failed to identify anywhere in it, expressed or inferred, which authorized the police to deny that access. In fact, the learned senior federal counsel to his credit even admitted that he likewise failed to identify any relevant provision that empowered the police to issue the letter of 10 May 2002. He could only allude to case laws for assistance.

To appreciate the problem at hand, it is quite necessary for me to trace slightly the historical route of a detainee, in his battle to be allowed to consult a lawyer to represent his interest. I will begin with *Ooi Ah Phua v Officer-in-Charge of Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 which propounded that the right of an arrested person to consult his lawyer began from the moment of arrest, but such right not being exercisable immediately after that arrest. A balance had to be struck between the right of the detainee, and any investigation undertaken by the police, simultaneously mindful of the interest of the public.

In the process of its submission, the detainee attempted to press on the suggestion that in the circumstances of the case, the police should have supplied cogent evidence to justify the rejection of the access application. The case alluded to was that of *Saul Hamid v PP* [1987] 2 MLJ 736. The detainee ventilated the views propounded by Edgar Joseph Jr J (as his Lordship then was), when discussing the right of a suspect to consult counsel, at the stage of s 117 of the Criminal Procedure Code. The court there had suggested that in the event access was rejected, the police was required to adduce sufficient evidence to convince a legal mind that there were substantial grounds to support the objection. Having reviewed the above case, it was my view that it was irrelevant, as the issue at hand was conspicuously distinguishable with the matter discussed there. If I may add further, to expect the police to adduce that cogent evidence would mean that the burden of proof would have shifted to them. This stance would be in total disagreement with the case of *Theresa Lim Chin Chin v Inspector General of Police* [1998] 1 MLJ 293, where Salleh Abas LP at p 297, had occasion to remark:

> When should a detainee arrested under s 73 of the Internal Security Act be allowed to exercise his right under art 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis*. In other words, the matter should be best left to the good judgment of the authority as when such right might not interfere with police investigation. To show breach of art 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article (emphasis mine).

Before arriving at some conclusion on the current legal poser, it is also quite necessary for me to touch on the case of *Mohamad Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 2 MLJ 481, as it was brought to my attention by the respondent's representatives. Touching only on the relevant part under discussion, the High Court there had opined that the right to legal access of a person detained under the Internal Security Act must be considered in the light of art 151(3) of the Federal Constitution and s 16 of the same Act. The court eventually concluded that denial of legal access to a detainee till the police decided that it was appropriate to do so, was to achieve the object of the provisions permitting non-disclosure of facts. Having perused art 151(3) of the Federal Constitution and s 16 of the Internal Security Act, it is my view that they are provisions that bestow a privilege on the authorities whether to release or not the information, subject to it not being against national interest. The issue of disclosure of information vis-a-vis the constitutional right of a detainee to have access to counsel is two totally separate and distinct matters. Article 5(3) distinctly deals with the constitutional right of a detainee to consult a lawyer whilst art 151(3) and s 16 of the Internal Security Act deal with the right of the authorities to disclose information, which will not be against national interest.

As a High Court judge is subject to the principle of stare decisis, I am therefore bound by the above view of Salleh Abas LP in *Theresa Lim Chin*

Chin v Inspector General of Police. From the latter case, in relation to the limited matter under discussion, I have summarized the relevant portion to be, that:

1 the Federal Court agreed that the right to consult a counsel of his choice is entrenched in art 5(3) of the Federal Constitution;

2 when a detainee may exercise his right to consult a counsel of his choice will be left to the good judgment of the police;

3 the onus of showing a breach of art 5(3) rested on the shoulders of the applicant; and

4 that it is the detainee who must prove that the police had acted in bad faith in obstructing the detainee from exercising his right.

From the above, the scenario that may be gauged on the legal playing field will be as follows:

Both the police and the detainee know that the latter has an entrenched constitutional right under art 5(3) to consult a lawyer of his choice. In the event he desires to see that lawyer, an application as in the current case, will have to be made. Regardless of that guaranteed promulgated right, ironically the police then will decide, to grant that access or not. To pour salt on the wound, the ball then will dramatically roll to the detainee's court whereby he will have to allege that art 5(3) had been breached when a rejection had occurred. Following the above view of *Theresa Lim Chin Chin*, there is no necessity for the authorities to justify the rejection of the access application. Yet by analogy, the authorities in *Karam Singh v Minister of Home Affairs* [1969] 2 MLJ 129 was required to justify the detention after a complaint had been received that the impugned detention was illegal. Once the detention order pursuant to law had been produced, with it being proved authentic and done in good faith, the onus then shifts back to the detainee to show bad faith on the part of the detaining authorities. The ironic twist in the current case is that, despite the non-requirement of the police to justify the arrest, running counter to *Karam Singh* rationale (and an issue for future consideration by superior courts), the onus still remains on the detainee to prove *mala fide* on the part of the police. Not only must he be a mind reader and speculate on the reasons of the rejection, but must prove *mala fide* without help from them. With near nothing to start off, and trapped within the confines of the inscrutable faces of his jailors, he might as well throw in the towel. Thankfully, the only avenue still left unplugged is that there are no inhibitive case laws or statutory provisions that restrict the *manner* of proving that *mala fide* factor.

Taking the cue from the last remark, I had to sieve the evidence and decide whether the detainee had indeed successfully proved it. Let us now sift the evidence. It was undeniable that on 6 May 2002 the detainee's family was allowed to see him for about forty minutes. In open court his counsel further related that apart from that visit, his family had been able to see him a couple more times, prior to the hearing. This factor had a profound effect on the bearing of the case as I found that the arbitrary attitude of the police permitting the family, but not his solicitors was

disconcerting to say the least. Surely in that circumstance, legal advice would have been more imperative and beneficial to the detainee, rather than a social visit from his family. Even though some temporary reprieve to his peace of mind could be attained by the presence of his immediate family, surely permanent freedom would have been uppermost in his mind at that stressful moment. I could not help but conclude that the coldly calculative selection and motive of the police was already questionable at that stage. By being deliberately discerning, the police had deprived him of prompt professional advice at such a crucial moment bearing in mind that the incarceration of a person not in accordance with law, however short must not be condoned.

Furthermore, if lawyers may impede or derail police investigations, why not his relatives who may be more persuasive and troublesome? I failed to find any presumption provisions, or arrive at some sensible conclusion that lawyers have a higher propensity to be meddlesome, and a greater threat to the security of this country at that stage of the police investigation.

Apart from the above analysis, the very contents of the letter of 10 May 2002 was confusing as the refusal of that access, was with the intention of avoiding any derailment of a smooth investigation. What investigation? Did the letter mean that an ongoing investigation was still in process, which pertained the general security of Malaysia, or the detainee was a threat to the country, or no grounds had yet been identified to justify the arrest? Surely the contents of this letter was a contradiction in terms, as it is trite that the moment a detainee is arrested, the police already had the grounds to do so. In that sense how could access to lawyers impede any investigation pertaining to his involvement with security threats, when investigations had already resulted in the amassing of facts on which the satisfaction of the police was based prior to his arrest, hence the availability of grounds to arrest him? Having grounds which are conclusions drawn from those facts, eventually prompting that arrest, and when the detainee ought to be informed of the arrest are two totally different matters, and they ought not to be confused. If ever additional investigation was needed it would have been merely to tie up loose ends in the gathered facts. No new grounds surfacing *after the arrest* could assist the authorities, as they could not have been the grounds to satisfy them in the *first instance*, when placing the detainee under custody.

As it is not required that the detainee must prove its assertion beyond reasonable doubt, what with the sufficiency of the above factors, I had no difficulty in arriving at the conclusion that the police had indeed acted in a *mala fide* manner here. The consequential order that flowed was that 'order in terms' was granted to the first prayer.

Without intending to appear too shaken by the behavior of certain unidentified person or persons in the police force, it was quite regretful to be informed that the detainee's counsel had failed to meet up with him at 2.30pm the next day despite my order, on the ground that he had been carted off to hospital on some medical pretext. His family through counsel had informed me that he, in his entire adult life, had never fallen ill, serious

enough to warrant a visit to the hospital. This providential co-incidence of being struck by illness on the appointed hour, and thus be deprived of the chance of securing redress at the earliest opportunity, surely would exacerbate matters and cause more consternation in the minds of ordinary citizens. The noble intention of arresting unsavory characters, with the sole purpose of ensuring permanent stability in Malaysia, surely has the backing of all right-minded citizens. But let not the very people who are supposed to be our protectors, go overboard and end up hijacking the hard-earned democratic processes, to the extent of sidelining a court order. It will be the lowest ebb in the history of the judiciary comes the day when a perfectly legitimate court order may be contemptuously, but legally avoided by certain irresponsible persons who are endowed with certain specialized skills. The good name of the police force, held in high esteem by the public, might also be besmirched due to the questionable *modus operandi* of a few recalcitrant members. Any repetition of this absurd antic in future will only vindicate my fears.

Application allowed.

Reported by Hanim Kamaruddin